Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

IN THE MATTER OF STEPHEN A. WEINGRAD,
AN ATTORNEY AND COUNSELOR-AT-LAW:

DEPARTMENTAL DISCIPLINARY COMMITTEE,

/Respondent,

-against-

STEPHEN A. WEINGRAD,

/Petitioner

Petition for Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Department

PETITION FOR WRIT OF CERTIORARI

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43 pp

QUESTION PRESENTED

Whether Constitutional principles of procedural due process prohibit a State Disciplinary Panel from elevating the level of recommended sanctioning, without notice, the opportunity to be heard, fair hearing and without statutory authority?

TABLE OF CONTENTS

		Page
1.	THE DECISION AND QUESTIONS PRESENTED	i
2.	TABLE OF CONTENTS	ii
3.	TABLE OF CITATIONS AND STATUTES	ii
4.	OPINIONS BELOW	1
5.	STATEMENT OF JURISDICTION	2
6.	CONSTITUTIONAL PROVISION AND STATUTE INVOLVED	2
9.	STATEMENT OF THE CASE	3
10.	REASONS FOR GRANTING THE WRIT	5
11.	CONCLUSION	7

TABLE OF CITATIONS

Cases Cited:

1. *District of Columbia Court of Appeals v. Feldman*, *460 U.S. 462, 103 S.Ct. 1303 (1983)*

Statutes Cited:

1. *Disciplinary Rule Sections 9-102A and 9-102(B)*

2. *First Department District Rule §605.16(a)(1)*

United States Constitution Cited:

United States Constitution Cited: U.S.C.A. Const. Amend. 14

APPENDIX

Appendix A- CONFIDENTIAL REPORT AND RECOMMENDATION, Dated April 14, 1993 . . . . . 1a

Appendix B- CONFIDENTIAL REPORT AND RECOMMENDATION Dated July 1, 1993 . . . . . 24a

Appendix C- ORDER OF THE APPELLATE DIVISION, FIRST DEPARTMENT, Dated March 22, 1994 . . . 27a

Appendix D- ORDER OF THE COURT OF APPEALS, Dated May 10, 1994 . . . . . 30a

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OPINIONS BELOW

The decision of the Appellate Division of the State of New York, First Department, which confirmed the second Panel findings and recommendations, is reported at *609 N.Y.S. 2d 588*, and was decided on March 22,

1994. (A. 27-29) The Petitioner's motion for leave to appeal to the Court of Appeals of the State of New York was denied by the Court of Appeals of the State of New York, by Order dated May 10, 1994. (A.30)

STATEMENT OF JURISDICTION

The final order of the Court of Appeals for the State of New York was entered on May 10, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This writ is brought pursuant to the Fourteenth Amendment procedural due process protections. The statutes which require review are: *Disciplinary Rule Sections 9-102A and 9-102(B)* and *First Department District Rule §605.16(a)(1)*.

The filing of this writ will be followed by a companion writ from a decision rendered in the United States Court of Appeals which denied Petitioner the right to challenge the constitutionality of the underlying statutes and procedures employed by the Disciplinary Panel. The Federal District Court and the USCCA declined jurisdiction to hear the issues raised pertaining to the Constitutional challenges. Petitioner seeks clarification of the standard for federal Court review as set forth in ***District of Columbia Court of Appeals v. Feldman**, 460 U.S. 462, 103 S.Ct. 1303 (1983)* Consolidation of this writ with the companion case to be filed is requested.

STATEMENT OF THE CASE

A. The Statute

This case focuses on First Department Rule, Section 605.16(a)(1), entitled "Reopening of Record, Reopening on Application of Respondent, Application to Reopen". This provision provides in its entirety, as follows:

> " (1) *Application to Reopen.* No application to reopen a proceeding shall be granted except upon the application, **prior to the filing of the hearing panel of its report, of the Respondent** and only upon **good cause shown**. Such application shall set forth clearly the facts claimed to constitute grounds for reopening of the proceeding, and shall be filed with the Office of Chief Counsel. A copy of such application shall be served by the Respondent upon all of the parties." *McKinney's 1993 New York Rules of Court Supreme Court Appellate Division First Department §605.16(a)(1) Emphasis Supplied.*

The plain language and meaning of Section 605.16(A)(1) is utterly clear in its mandates:

1. only the Respondent can seek reopening of the proceedings and only before a written report.

and

2. no application to reopen a proceeding shall be granted except upon the application, prior to the filing by the Hearing Panel of its report. . . . *Emphasis Supplied*

This case also focuses on Disciplinary Rule Sections 9-102A and 9-102(B) (herein after "A" and "B") which governs deposits and withdrawals from attorney escrow accounts. This provision reads in pertinent part:

> "(A) **Prohibition Against Commingling.** A lawyer in possession of any funds. . . **must** not commingle such property with his or her own.
> (B) **Separate Accounts.** . . .
> (4) Funds belonging in part to the client. . . or law firm shall be kept in such special accounts, but the portion belonging to the lawyer or law firm may be withdrawn when due." *Emphasis Supplied*

Provision A expressly prohibits commingling. Provision B permits commingling and does not require that attorney funds must be withdrawn, permitting the funds to remain commingled! The two statutes are contradictory on their face.

Under this vague statute no provision is made for unexpected bank charges for fees or returned checks. Attorneys with an escrow account in New York are prudently expected to keep an excess commingled balance of personal funds for such common contingencies. They are unprotected before a zealous prosecutor!

B. The Facts

In a disciplinary proceeding specific charges were issued against the Petitioner. This resulted in a hearing after which a lengthy Report and Recommendation was issued by the Panel. (A. 1-23) Subsequent to the issuance of the written report, the Prosecutor applied for reconsideration and an increase in the recommended sanction based upon a change in the law subsequent to the written recommendation of the Panel.

The Panel succumbed to the request of the Prosecutor and issued a second Report and Recommendation which elevated the level of sanctioning from a public censure to suspension based upon charges which were not issued against the Petitioner and without providing the Petitioner with notice, an opportunity to be heard and a new hearing.

The Appellate Division confirmed the second report of the Disciplinary Panel and the suspension of Petitioner from the practice of law.(A.24-26) The Petitioner's suspension was predicated on the rules which are the subject of this writ.

REASONS FOR GRANTING THE WRIT

The proceedings below have major impact upon all members of the bar and the public. Procedural due process safeguards are fundamental to our system of justice and should never be ignored. This is especially true where members of the bar who are trained and educated and licensed to uphold the law are involved, both as the prosecutor and as the accused. To strip an accused of their very livelihood requires strict adherence to due process procedural safeguards. To permit a body

which controls the conduct of attorneys, to act in a manner grossly violative of the Constitutional right to procedural due process, is beyond all reason and defies the very essence of Constitutional safeguards.

The Prosecutor in this case was permitted to reopen proceedings in violation of Disciplinary Department Rules, without affording Petitioner notice, an opportunity to be heard and a new hearing. This sets forth what must be deemed an impermissible precedent. Where the system goes unchecked, the zealous prosecutor is now permitted to revisit the proceeding at any time after it is finished, (as he did in this case), to attempt to obtain a different result. This defeats the essence of the Constitutional protection.

In it's second Report the Panel :
a. changed the **charges**
b. changed the **evidence**
c. changed the **conclusions**
d. changed the **penalty**

All of this was done without notice or a new hearing pursuant to no rule.

In addition to the aforesaid; *Disciplinary Rule Sections 9-102A and 9-102(B)* are contradictory on their face. This Court should take cognizance of the fact that tens of thousands of attorneys in New York State are currently operating under two rules which are in opposition to each other with no guideline or direction to steer an attorney when depositing clients funds. Rule A permits no deposits or commingling while Rule B permits commingling. They are inherently in conflict because they fail to delineate that the practice of commingling fees and clients funds under "B" is not a violation of "A". Thus an

attorney can be found guilty under B while operating under A. Tens of thousands of attorneys are currently depositing two party checks (for the lawyer and the client) in their escrow account resulting in a technical violation of A. The aforesaid statutes are so vague that every single attorney in New York State, without exception, who is holding clients funds, can be prosecuted for an inherent violation at any time.

CONCLUSION

This Court should address the issues presented herein which are of paramount importance to the hundreds of thousands of attorneys practicing law in New York State.

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APPENDIX A - CONFIDENTIAL REPORT AND RECOMMENDATION, Dated April 14, 1993

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST JUDICIAL DEPARTMENT

----------X

Before a Hearing Panel

In the Matter of :
Stephen A. Weingrad :

Stephen R. Kaye, Esq.-Chair
Rosalind S. Fink, Esq.
Joanne Sidener Johnson

Respondent. :
----------X Docket No. 59/91

CONFIDENTIAL

REPORT AND RECOMMENDATION

Introduction

Respondent, Stephen A. Weingrad, Esq., has been charged with violating DR 1-102(A)(4), DR 1-102(A)(6), DR 1-102(A)(7) and DR 9-102(A) because he allegedly used client trust funds for personal or business purposes. Respondent has also been charged with violating DR 1-102(A)(4), DR 1-102(A)(7) and DR 6-101(A)(3) because he allegedly neglected a client's case and made misrepresentations to the client concerning his efforts on her behalf.

Appendix A

We conclude, based on the facts and reasons detailed in this report, that certain of these charges be sustained and that respondent be publicly censured as the appropriate sanction for the violations that he has committed.

Jurisdiction and Prior Proceedings

Respondent was admitted to practice law in the State of New York by the Appellate Division, First Department in 1964, and has maintained an office for the practice of law within this Department at all times relevant to the charges made against him.

An Amended Statement of Charges was filed against respondent on December 27, 1991 and respondent's Answer to these charges were filed on February 13, 1992. Copies of these pleadings are annexed to this Report. Respondent has been represented by counsel throughout this proceeding.

The Panel has conducted three hearings in this matter. The first two hearings, held on May 18 and June 8, 1992, addressed whether respondent violated the Code of Professional Responsibility ("the Code"). At these first two hearings, counsel for staff and respondent were heard, oral testimony was given by Judith Shotwell, Mary Ellen Tunney, James Lufty, and Kenneth Mersel, and respondent testified on direct and cross examination. Various exhibits, including numerous bank statements,

were also received in evidence. The transcript of these hearings has been annexed to this Report.

Legal memoranda was submitted on July 15, 1992 by counsel for staff and on August 25, 1992 by counsel for respondent.

On September 25, 1992, the Chair of this Panel notified counsel for staff and respondent of the Panel's findings with respect to respondent's violations of the Code. On November 23, 1992, staff submitted a memorandum on the issue of sanctions.

A hearing was held on December 3, 1992 to address the issue of sanctions. At this hearing, counsel for staff and respondent were heard, oral testimony was presented by Arnold Lasky, and respondent testified on direct and cross-examination. The transcript of this hearing has been annexed to this Report.

On December 16, 1992, respondent submitted a notice of motion and supporting papers requesting the following: an order granting reargument and reconsideration of the Panel's findings in Charges Three, Four and Five; that the matter not be referred to the Appellate Division; and that the appropriate sanction for violations under Charges One and Two be a private reprimand together with any other relief the Panel deemed just and proper.

Staff submitted an Affirmation in response to this motion on December 30, 1992, and respondent submitted

an Affirmation in reply on January 8, 1993. Respondent also submitted an affidavit in motion from one of the complainants, Vidal Gutierrez, on December 30, 1992. These papers are annexed to this report.

Financial Misconduct

Three separate charges of financial misconduct were raised against respondent. The first two charges, concerning the Lowden Estate funds and the Gutierrez settlement funds, allege that respondent committed financial misconduct with respect to his handling of specific client funds, while the third charge alleges that respondent had an ongoing practice of using client trust funds to meet his office payroll expenses and other personal or business needs.

A. Charge one: The Lowden Estate

Based on the following facts, which are essentially undisputed, respondent was charged with engaging in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of DR 1-102(A)(4), failing to safeguard client funds in violation of DR 9-102(A), and engaging in conduct reflecting adversely on his fitness to practice law in violation of DR 1-102(A)(6).[1]

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[1] The Disciplinary Rules alleged to have been violated in Charge One refer to those found in the Code prior to the

Appendix A

1. Facts

Respondent was appointed executor of the Patricia Lowden Estate ("Lowden Estate") in the Spring of 1988. He also served as the Lowden Estate's attorney. The Lowden Estate's principal asset was a cooperative apartment, Apt. 8H at 35 Park Avenue, New York City ("the apartment").

In early October 1988, respondent arranged for the sale of Apt 8H to Hal and Catherine Golden (the "Goldens") for $116,250.00. On October 11, 1988, the Goldens gave respondent, as attorney for the Lowden Estate, a deposit check in the amount of $11,000.00.

On October 18, 1988, respondent deposited the $11,000.00 in his Chase Special account, entitled "Weingrad & Weingrad, P.C. Special Account" (acc't. #150664). In fact, respondent's special account actually consisted of two interconnected accounts, an interest bearing half (acc't. #150680) and a check writing half (acc't. #150664). Respondent was able to write checks on both of these accounts as one combined account ("Chase Special Account"), as do we for purposes of this proceeding.

On or about November 8, 1988, respondent's office opened the Lowden Estate account at the Manufacturer's Hanover Bank ("Lowden Estate Account")

September 1, 1990 amendments.

with a $1,000.00 deposit. Subsequently, on or about November 10, 1988, the Goldens gave respondent another check in the amount of $90,250.00, written to "Stephen A. Weingrad as Executor."

On November 15, 1988, one day after the closing on the apartment, respondent deposited the $90,250.00 check, together with another check from Merrill Lynch for $15,000.00 payable to Weingrad and Hal Golden (which Golden endorsed to Weingrad), into his Chase Special Account, and not into the Lowden Estate Account.

By November 15, 1988, respondent had received a total of $116,250.00 from the Goldens on behalf of the Lowden Estate ($11,000.00 + $90,250.00 + $15,000.00). After closing disbursements totalling $12,153.00, respondent should have been holding $104,097.00 as net proceeds of the sale of Apt. 8H in an escrow or trust account on behalf of the Lowden Estate. However, on November 28, 1988, the balance in respondent's Chase Special Account was only $66,795.00, and the balance in respondent's Lowden Estate Account was only $1,000.00.

It is undisputed that between November 15, 1988 and November 28, 1988, respondent's office drew a series of checks on his Chase Special Account, some of which were payable to "cash", for the purpose of covering respondent's office payroll. According to respondent, it was his practice for over twenty eight years to draw checks every two weeks from his escrow account

to "cash" in order to cover his payroll and office expense (Tr. 36-37, 52-54, 61).

2. Panel's Findings

The Panel, relying on Matter of Altomerianos, 160 A.D. 2d 96 (1st Dep't 1990), finds that respondent's actions were in violation of DR 9-102(A) and DR 1-102(A)(6), but not in violation of DR 1-102(A)(4).

In Matter of Altomerianos, the First Department found that an attorney violated DR 9-102(A), but not DR 1-102(A)(4), when he allowed the balance in an improperly commingled account to fall below the amount the attorney was supposed to hold in escrow.

In Altomerianos, an attorney represented the seller in a sale of a restaurant. The attorney was given $25,000.00 to be placed in escrow in order to secure payment of any sales tax which might be assessed against the restaurant while it was still owned by the seller. The attorney, however, mistakenly thought that part of this money was meant to secure payment of all liabilities, and not just sales tax.

The attorney, inexperienced in commercial transactions and unaware of the requirement to maintain an attorney's special account, placed the $25,000.00 in his general business account. The attorney later disbursed $10,000.00 for purposes other than the payment of sales

tax, and also withdrew some of this money for his own use.

The court held that the attorney violated DR 1-102(A) as soon as he deposited the $25,000.00 in his general business account. However, the court also held that the attorney was not guilty of violating DR 1-102(A)(4). According to the court, venal intent is a necessary element to DR 1-102(A)(4), and, in Altomerianos, the court did not believe that the attorney's conduct was dishonest or deceitful.

Respondent, like the attorney in Altomerianos, did not maintain the required balance in a special account for funds he was supposed to be holding for his client. Respondent admits that on November 28, 1988 the balance in his Chase Special Account was only approximately $66,000.00, when he should have been holding at least $104,000.00 in the account on behalf of the Lowden Estate. (Tr. 26-33, Respondent's Summary of the Evidence, Proposed Findings of Fact and Conclusions of Law at p. 13) (hereafter "Respondent's Summary"). Respondent also admits that between November 15, 1988 and November 28, 1988, he drew a series of checks from his Chase Special Account payable to cash, to other clients, or to cover business expenses. (Tr. 26).

Respondent argues that, although his Chase Special Account's balance was approximately $38,000.00 less than it should have been, he did not knowingly or intentionally convert Lowden Estate funds. (Respondent's

Summary at p. 13). Respondent states that it was his practice for a period of twenty eight years to deposit all settlement proceeds into his Chase Special Account and then, on a bi-weekly basis, withdraw money from this account to cover his office and payroll expenses. (Respondent's Summary at p. 13). Respondent adds that he never encountered problems with his escrow account in the past.

Respondent also states that during the period from November 15, through November 28, 1988, he was not running the day to day operations at his law office due to "serious family problems". (Respondent's Summary at p. 13). Furthermore, respondent states that during this period he was unaware of the balance in his Chase Special Account. (Tr. 36)

Despite respondent's arguments, the Panel finds that respondent violated DR 1-102(A) as soon as he allowed the balance in his Chase Special Account to fall below the amount he was required to be holding in escrow for the Lowden Estate.

The Panel also finds that respondent violated DR 1-102(A)(6) because his conduct in this matter adversely reflected on his fitness to practice law. Respondent violated his duty not to use or otherwise borrow funds belonging to a client without the client's express authorization, a duty respondent fully understood. (Tr. 18-20)

However, the Panel finds that the evidence presented did not establish the existence of veal intent as required by Altomerianos, and therefore fails to sustain the charge of violation of DR 1-102(A)(4). Although the evidence clearly shows that respondent was careless in not maintaining the proper balance in his Chase Special Account, and a question is raised by the deposit of Lowden Estate monies into this account, rather than into the Lowden Estate Account especially set up for the estate, no evidence was introduced suggesting that respondent intended to permanently convert any funds, nor did staff prove that respondent acted in a manner which can be classified as either "deceitful" or "dishonest".

B. Charge Two: Gutierrez Settlement Funds

Based on the following facts, respondent was charged with engaging in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of DR 1-102(A)(4), failing to safeguard client funds in violation of DR 1-102(A), and engaging in conduct reflecting adversely on his fitness to practice law in violation of DR 1-102(A)(7).[2]

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[2] The Disciplinary Rules alleged to have been violated in Charge Two represent those found in the Code after the September 1, 1990 amendments.

Appendix A

1. Facts

Vidal Gutierrez ("Gutierrez") retained respondent on or about January 14, 1986 to represent him in connection with an injury that occurred when a sign fell on his head. The case was settled during the trial for $19,000.00.

Subsequent to the settlement, the defendant's insurer issued a two party check payable to Gutierrez and respondent in the amount of $19,000.00. Respondent deposited the check into his Chase Special Account on or about March 21, 1991.

Between March 21, 1991 and approximately August 15, 1991, respondent conducted negotiations with the Department of Social Services ("the DSS") with respect to a lien that had been placed on the settlement funds. He was eventually able to persuade the DSS to let Gutierrez keep $1,000.00, and the remaining $18,000.00 was disbursed partially to the DSS and partially to respondent and another attorney as a fee. Respondent and the other attorney each received $3,246.37 totaling $6,492.74.

During the period from April 19, 1991 to April 22, 1991, respondent did not maintain the Gutierrez Settlement Funds intact in his Chase Special Account. Specifically, on April 11, 1991, the balance in respondent's Chase Special Account was $16,775.21. On April 19, 1991, respondent drew a $9,000.00 check on his Chase Special Account, payable to "cash", which he

used to meet his office payroll. In so doing, respondent caused the balance in his Chase Special Account to fall to only $14,277.11, of which $7,489.42 represented funds deposited on April 16 and April 19, 1991 on behalf of other clients.

Staff claims the shortfall in respondent's Chase Special Account from April 19 through April 22, 1992 is approximately $5,720.00.[3] Respondent claims that the shortfall is closer to $2,700.00, because approximately one third of the $7,489.42 (other clients' money) represents legal fees respondent had not yet removed from his Chase Special Account. For purposes of this charge, the Panel finds that the difference in position between staff and respondent with respect to the amount of the shortfall to be irrelevant. Rather, the relevant point, which is admitted by respondent, is that respondent's Chase Special Account fell below the required balance. (Respondent's Summary at pp. 14-15)

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[3] Staff calculates the shortfall in the following manner: $14,277.00 (balance on April 19, 1992) - $7,489.00 (other client's money deposited in account) = $6,788.00 (amount remaining to represent Gutierrez' funds); $12,507.00 (actual amount of Gutierrez funds respondent should have been maintaining) - $6,788.00 (Gutierrez funds respondent actually maintaining) = $5,719.00 (shortfall).

2. Panel's Findings

By the same reasoning employed in Charge One, the Panel finds that respondent violated DR 1-102(A)(7) and DR 9-102(A), but not DR 1-102(A)(4).

Respondent violated DR 1-102(A)(7) and DR 9-102(A) by admittedly allowing his Chase Special Account to fall below the amount he was required to maintain with respect to the Gutierrez Settlement funds. (Respondent's Summary at p. 4). However, the Panel again finds that the evidence presented id not establish venal intent, and therefore does not sustain the charge of violation of DR 1-102(A)(4).

C. Charge Three: Ongoing Practice of Financial Misconduct

Respondent is charged with using client trust funds or escrow funds to meet his business or personal expenses on an ongoing basis, and thereby engaging in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of DR 1-102(A)(4), failing to safeguard client funds in violation of DR 9-102(A), and engaging in conduct reflecting adversely on his fitness to practice law in violation of DR 1-102(A)(6) (prior to September 1, 1990) or DR 1-102(A)(7) (after September 1, 1990).

This charge is based on respondent's practice for over twenty eight years to draw checks every two weeks

from his escrow account to "cash" in order to cover his payroll and office expenses. (Tr. 36-27, 52054, 61).

As in Charges One and Two, the Panel finds that respondent, on an ongoing basis, violated DR 1-102(A)(6) and (7) and DR 9-102(A), but did not violate DR 1-102(A)(4).

Respondent conceded that his method of conducting his business affairs was not in keeping within acceptable practices. (Respondent's Summary at pp. 3-4). He also admitted to drawing checks from his Chase Special Account without being aware of the balance in the account (Tr. 36), and therefore being unaware whether he was maintaining the proper balance in the account or not, as well as risking violation of his fiduciary duty to maintain client funds intact. Nonetheless, the evidence did not establish that respondent acted with venal intent.

NEGLECT AND MISREPRESENTATION

Based on the following facts, respondent was charged with: (1) failing to diligently pursue discovery or otherwise move a case to trial, thereby neglecting a legal matter entrusted to him in violation of DR 6-101(A)(3); and (2) telling a client that she had "no case", and that a principal witness in the case was unavailable when respondent had in fact made little or no effort to locate the witness, thereby engaging in conduct adversely reflecting on his fitness to practice law in violation of DR 1-102(A)(7).

Appendix A

A. Facts

On December 3, 1984, Julius Kramer was struck and killed by a van owned by Original Arts Manufacturing Corp. ("Original Arts") and driven by Lester Slawinsky ("Slawinsky"), since deceased.

Thereafter, Elaine Kramer ("Kramer"), widow of Julius Kramer, brought a wrongful death action against Original Arts and Slawinsky, Kramer v. Original Arts, etal, N.Y. Sup. Ct., Index No. #15165/85 (the "Kramer case"). Respondent substituted for the original counsel in 1986 to prosecute the action.

From 1986 through 1990, the primary actions taken by respondent in this case were to defend a deposition and to make several applications for the appointment of an administrator for Slawinsky's estate in New York before making a successful application in New Jersey.

Respondent was unable to depose Slawinsky before his death, and chose not to depose Slawinsky's wife ("Mrs. Slawinsky"), who was employed by Original Arts at the time of the accident and was a critical witness as to the defense contention that Slawinsky had no authority to operate the vehicle. (Tr. 193)

On or about February 9, 1990, respondent met with Kramer's daughter, Judith Shotwell ("Shotwell") and a friend to discuss the status of the Kramer case.

Shotwell testified that respondent told her that the case was a "no win" and a "loss leader" (Tr. 73, 113), and that respondent did not depose Mrs. Slawinsky because she "had not only left the company, but she had left the state." (Tr. 106). Respondent testified that counsel for Original Arts told him that Mrs. Slawinsky no longer worked for the company. (Tr. 193)

In any event, the attorney-client relationship between Shotwell and respondent deteriorated after this meeting, and, a short time later, Shotwell discharged respondent and retained James L. Lufty, Esq. ("Lufty")

Soon after Lufty was retained, he located and deposed Mrs. Slawinsky, who was in fact still working for Original Arts. Lufty also deposed the owner of Original Arts and two other drivers as well. Additionally, Lufty discovered that Slawinsky was covered by an insurance policy held by Mrs. Slawinsky for $100,000.00.

Lufty also discovered that no one had applied for the no-fault insurance benefits in this case on behalf of Kramer. Lufty made the application and received $2,000.00 on behalf of the estate.[4] (Tr. 130)

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[4] At the second hearing, respondent admits that he did not review the files to see if the No-fault benefit had been paid. (Tr. 282-83).

Soon thereafter, Original Arts' motion for summary judgment was denied and the case was ordered to trial. Prior to the trial, on October 10, 1991, the case was settled for $120,000.00.

B. Charge Four: Neglect

The Panel finds that respondent failed to diligently pursue discovery in this case, and therefore violated DR 6-101(A)(3).

The Panel recognizes that respondent did take some action in this case, primarily to obtain an administrator for Slawinsky's estate, and that respondent believed that the case could not significantly move forward until such an administrator was appointed.

However, the Panel also believes that respondent should have taken additional steps in this matter. Respondent should have made more of an effort to depose Mrs. Slawinsky and to determine Slawinsky's insurance status.

Respondent claims that he did not need the testimony of Mrs. Slawinsky because a prior deposition of an Original Arts employee stated that Mrs. Slawinsky was in charge of authorizing the use of the company's vehicle, and that she had authorized Slawinsky's use of the vehicle the instance when Slawinsky struck Julius Kramer. (Tr. 169).

However, a deposition of Mrs. Slawinsky would have provided additional information to rebut Original Arts' position that Slawinsky did not have permission to operate the vehicle, and would have also provided information as to Slawinsky's insurance status.

One of respondent's excuses for not deposing Mrs. Slawinsky was his belief that Mrs. Slawinsky no longer worked for Original Arts and could not be readily found. This belief was based on a statement allegedly made at an early conference in this case by the attorney for the defendant company. (Tr. 193). However, respondent never made any further investigation to determine whether this "fact" was true, or to determine where Mrs. Slawinsky was.

Respondent's neglect in this matter is highlighted by the actions of subsequent counsel. Lufty was quickly able to locate Mrs. Slawinsky and depose her, as well as to find out that she still worked for Original Arts. (Tr. 129) Lufty was also able to readily obtain Mrs. Slawinsky's personal insurance policy, which covered Slawinsky in this matter. (Tr. 127). The discovery of this insurance policy played a significant role in the settlement of this case. (Tr. 122).

C. Charge Five: Misrepresentation

The Panel finds that respondent violated DR 1-102(A)(4) and (7) when he falsely told Shotwell that Mrs. Slawinsky "had not only left the company, but she had

left the state". (Tr. 106) This statement turned out to be false, as Mrs. Slawinsky was employed with Original Arts at the time.

The basis for respondent's statement was a statement he recalls hearing from the attorney for the defendant company at a conference. (Tr. 193) Respondent made absolutely no independent investigation to determine whether this statement was true or not. Respondent did not even make a follow-up phone call to Original Arts to confirm this information. Rather, respondent accepted this statement as a truth and passed it on to his client as fact.[5]

As to the charge of unprofessional conduct by respondent in telling his client she had "no case" or that the case was a "no win situation", the Panel finds that no disciplinary rule was violated. Based on Respondent's considerable experience in personal injury cases, including cases such as this where there was little pain

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[5] In his December 16, 1992 reargument motion, respondent alleged that Shotwell was not a credible witness because she allegedly forged her mother's signature on several documents. Since respondent does not deny making the statement regarding Mrs. Slawinsky's availability, the Panel finds respondent's allegation and argument to be irrelevant and makes no determination concerning this charge against Shotwell.

and suffering and where decedent was not gainfully employed, we conclude that respondent was no misrepresenting to Shotwell his genuine opinion concerning the value of the case. (Tr. 279-280).

Recommended Sanctions

In reaching its conclusions concerning appropriate sanctions, the Panel has taken into account respondent's prior unblemished record; the absence of any indication that any of respondent's many clients, other than in the Kramer case, had any complaint concerning the professional handling of the matter entrusted to respondent; and the very considerable pro bono and public interest activity of respondent.

A. Financial Misconduct

The Panel recommends a sanction of public censure for respondent's acts of financial misconduct. The Panel recognizes the serious nature of respondent's misconduct. However, the Panel also believes that a suspension would be unduly harsh under the circumstances of this case.

One of the major factors considered by the Panel in reaching its recommendation was that no evidence was introduced suggesting that respondent intended to permanently convert any funds, nor did staff prove that respondent acted in a manner which can be classified as

either "deceitful" or "dishonest". There also was no evidence introduced to indicate that any of respondent's clients were ever injured as a result of respondent's actions.

Moreover, the amount of time respondent's account fell below the required amount was brief. In Charge One (the Lowden Estate), respondent had a shortfall in his account for thirteen days, from November 15, 1988 through November 28, 1988. In Charge Two (the Gutierrez Settlement Funds), respondent's account dipped below the required amount for three days, from April 19, 1991 to April 22, 1991.

The Panel recognizes that there are cases, such as Altomerianos, where the court suspended attorneys who improperly commingled client funds. However, the Panel fins the recent (and post-Altomerianos) case of Matter of Greenberg 165 A.D. 2d 424 (1st Dep't 1991) to be applicable to this situation.

In Greenberg, respondent was charged with improperly commingling and converting client escrow funds in violation of DR 9-102(A) and DR 1-102(A)(4) and (6). During the hearings, it was revealed that respondent had previously been suspended for conversion of client's funds.

A Hearing Panel sustained charges of commingling against respondent, but dismissed charges of conversion. The Panel, with one member dissenting,

recommended that respondent be suspended for six months.

The Appellate Division confirmed the Panel's findings of fact and conclusions of law, but ordered that the respondent be censured. The court stated that a suspension would be "unduly harsh" under the circumstances of the case.

The court based its decision on the following factors: (1) the commingling was the result of "negligence and no more," (2) the need to protect the public was less than compelling, in light of the fact that respondent's practice consists mainly of federal litigation, and (3) no conversion occurred.

As in Greenberg, the commingling which occurred in the present case was the result of "negligence and no more." Furthermore, although respondent often used his escrow account in his personal injury practice, he as already modified his admittedly unacceptable past methods of handling this account (Respondent's Summary at 3-5). The Panel therefore does not find the need to protect the public to be "compelling", especially in light of the fact that respondent has never previously been charged with violating any disciplinary rules.[6]

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[6] In this respect, respondent compares favorably to respondent in Greenberg, who previously had been suspended for converting a client's funds.

Appendix A

Page 24a ommitted

In light of all of the above factors, the Panel recommends that respondent be publicly censured for the financial misconduct he committed in Charges One, Two and Three.

B. Neglect and Misrepresentation

The Panel recommends that respondent be publicly censured for his actions in the Kramer case. Although the Panel has found that respondent's actions were in violation of the Code, the Panel recognized that those violations occurred during the course of a difficult client-lawyer relationship.

Considering all of the circumstances, the Panel concludes that these violations were not sufficiently egregious to warrant suspension, whether considered separately or cumulatively with the violations based on negligent financial misconduct.

April 14, 1993

Stephen R. Kaye
Chair

Rosalind S. Fink
Member

Joanne Sidener Johnson
Member

APPENDIX B - CONFIDENTIAL REPORT AND RECOMMENDATION Dated July 1, 1993

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST JUDICIAL DEPARTMENT
----------X

Before a Hearing Panel
In the Matter of :

Stephen R. Kay, Esq.-Chair
Stephen A. Weingrad :
Rosalind S. Fink, Esq.
Joanne Sidener Johnson

Respondent. :
----------X Docket No. 59/91

CONFIDENTIAL

REPORT AND RECOMMENDATION WITH RESPECT TO MOTIONS FOR RECONSIDERATION

This Panel's Report and Recommendation dated April 14, 1993 was served on both parties on May 12, 1993. On May 18, 1993, Staff moved for reconsideration, supported by an affirmation of the same date submitted by Chief Counsel to the Departmental Disciplinary Committee. Respondent filed a cross-motion for reconsideration on June 3, 1993, supported by an affirmation by respondent dated June 2, 1993 and various exhibits.

Appendix B

The Panel granted the motion and cross-motion for reconsideration, and held an oral hearing on these motions on June 9, 1993.

The Panel disposes of the motion and cross-motion in the following manner:

A. Charges One, Two and Three: Financial Misconduct

Reconsidering the facts and precedent relating to financial misconduct, as well as the relevant precedent with respect to the sanction of such misconduct, the Panel withdraws its prior recommendation of public censure and instead recommends a one year suspension.

Although the amount of time respondent's account fell below the required amount was brief (thirteen days in one instance and three days in the other instance), there was nevertheless a conversion of funds during that period. In addition, the thirteen day conversion of the Lowden Estate funds (Charge One) would not have been occurred if the respondent had deposited the funds in the Lowden Estate bank account, as he should have, rather than in respondent's escrow account.

Finally, in now recommending a one year suspension instead of public censure, the Panel has accorded greater weight to the facts concerning respondent's persistent practice over twenty-eight years of negligently maintaining his escrow funds, as found in Charge Three.

Appendix B

B. Charges Four and Five: Neglect and Misrepresentation

The Panel adheres to its recommended sanction of public censure with respect to Charges Four and Five.

July 1, 1993

Stephen R. Kaye
Chair

Rosalind S. Fink
Member

Joanne Sidener Johnson
Member

APPENDIX C - ORDER OF THE APPELLATE DIVISION, FIRST DEPARTMENT, Dated March 22, 1994

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on March 22, 1994

Present - Hon. Betty Weinberg Ellerin, Justice Presiding
David Ross
Sidney H. Asch
Israel Rubin
Eugene Nardelli, Justices

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In the Matter of Stephen A. Weingrad, an attorney and counselor-at-law:

Departmental Disciplinary Committee for the First Judicial Department,

Petitioner, M-4641

M-5656

Stephen A. Weingrad, Esq.

Respondent.

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The Departmental Disciplinary Committee for the First Judicial Department, by Hal R. Lieberman, its attorney, having presented a petition to this Court on

Appendix C

October 20, 1993, seeking an order pursuant to 122 NYCRR ~603.4(d) confirming the findings and conclusions of the Hearing Panel and imposing whatever sanction upon Stephen A. Weingrad (who was admitted to practice as an attorney and counselor-at-law in the State of New York, on June 29, 1964, at a Term of the Appellate Division of the Supreme Court for the First Judicial Department), the Court deems just and equitable, but no less severe than the one year suspension recommended by the Hearing Panel,

And said respondent having appeared herein by Weingrad & Weingrad, P.C., his attorneys (Henry Mark Holzer, of counsel), and having interposed a cross-motion seeking an order disaffirming the report and censuring respondent,

Now, upon reading and filing the papers with respect to the petition and cross-motion, and due deliberation having been had therein, and upon the Opinion Per Curiam filed herein, and this Court having found and determined, inter alia, that: although respondent commingled escrow money and converted clients' funds, he did so without venal intent; there is no charge that respondent failed to cooperate; and that in view of respondent's considerable pro bono work and public interest activity, a one year suspension is appropriate, and it is therefore, unanimously

Ordered that the application be and the same hereby is granted only to the extent of confirming the Hearing Panel's findings of fact and conclusions of law,

the cross-motion is denied, and the respondent is suspended from practice as an attorney and counselor-at-law in the State of New York for a period of one year, effective April 22, 1994 and until the further order of this Court, and it is further unanimously

Ordered that said respondent be and hereby is commanded to refrain and desist from the practice of law in any form, either as principal or agent, clerk or employee of another, and is forbidden to appear as an attorney and counselor-at-law before any court, judge, justice, board, commission or other public authority, and is forbidden to give to another an opinion as to the law or its application, or any advise in relation thereto, for a period of one year, effective April 22, 1994 and until the further order of this Court. Respondent is directed to comply with Title 22, Section 603.13 of the Rules of the Appellate Division of the Supreme Court, First Department, a copy of which is annexed hereto and made a part hereof.

ENTER:

APPENDIX D - ORDER OF THE COURT OF APPEALS Dated May 10, 1994

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the 10th day of May, 1994.

PRESENT, HON. RICHARD D. SIMONS, Senior Associate Judge, presiding.

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1 Mo. No. 420
In the Matter of Stephen A. Weingrad, an attorney and counselor-at-law:

Departmental Disciplinary Committee for the First Judicial Department,

Respondent,

Stephen A. Weingrad, Esq.

Appellant.

A motion for leave to appeal to the Court of Appeals and for a stay in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion for leave to appeal be and the same hereby is denied; and it is

Appendix D

ORDERED, that the said motion for a stay be and the same hereby is dismissed as academic.
Chief Judge Kaye took no part.

Donald M. Sheraw
Clerk of the Court